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COLORADO COURT OF APPEALS Opinion by the Honorable Anthony Navarro The Honorable Craig Welling, concurring The Honorable David Richman, dissenting Case No. 2018CA0049 & 2018CA0760 DISTRICT COURT, DENVER COUNTY STATE OF COLORADO The Honorable Robert L. McGahey, Jr The Honorable Karen L. Brody Case No. 2014CV32213 & 2014CV32268	
Petitioner: DELTA AIR LINES, INC. v. **Respondent:** WILLIAM SCHOLLE	Colorado Supreme Court Case No.: 2019SC546
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BRIEF OF AMICI CURIAE COLORADO DEFENSE LAWYERS ASSOCIATION, COLORADO CIVIL JUSTICE LEAGUE, AND THE AMERICAN TORT REFORM ASSOCATION IN SUPPORT OF PETITIONER

AMICI'S CERTIFICATE OF COMPLIANCE

Undersigned counsel of record for *Amici* hereby certifies that this brief complies with all requirements of C.A.R. 29 and C.R.A. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d).

It contains 4,254 words (does not exceed 4,750 words).

The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

Dated: February 4, 2020

Respectfully submitted,

/s/Heather A. Salg
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STATEMENT OF AMICI CURIAE'S IDENTITY

The Colorado Defense Lawyer's Association (CDLA) is a non-profit association that exists to support and serve the interests of lawyers involved in the defense of civil litigation. CDLA has approximately 800 members from all corners of the State of Colorado. CDLA is committed to the defense of civil actions and the promotion of fairness and integrity in the civil justice system.

The Colorado Civil Justice League (CCJL) is a voluntary non-profit organization dedicated to improving Colorado's civil justice system through a combination of public education and outreach, legal advocacy, and legislative initiative. It is a diverse coalition of large and small businesses, trade associations, individual citizens, and private attorneys. Founded in 2000, CCJL has been actively involved in reform of Colorado's civil liability system. Its mission is to foster a fair and efficient system of civil justice through supporting legislation and other undertakings that provide and support for adequate compensation for victims of wrongdoing or negligence and proper protections against unfounded, abusive, or speculative claims.

The American Tort Reform Association (ATRA) was founded in 1986. It is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil

justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. ATRA has affiliated coalitions in more than 40 states. ATRA is dedicated to improving the American civil justice system, including through public education and legislative efforts to bring greater fairness, predictability, and efficiency to the civil justice system.

In filing an *amici curiae* brief, CDLA, CCJL, and ATRA intend to provide further information to the Court regarding the important policy considerations involved beyond just the facts of this case regarding the admissibility of expenses charged in excess of the statutory fee schedule in workers' compensation cases.

Amici have submitted amicus curiae briefs to this Court on numerous previous occasions, and especially on cases that would expand liability, broaden damages that claimants may recover, or produce unbalanced approaches to civil litigation.

INTRODUCTION

The majority determined that injured workers may recover billed amounts of medical expenses in excess of the workers' compensation fee schedule. In doing so, however, it failed to consider that such a result violates Colorado law regarding punitive damages and prejudgment interest.

This Court has previously recognized that billed amounts of medical expenses are nothing more than "theoretical damages[.]" *Volunteers of America v.*

Gardenswartz, 242 P.3d 1080, 1090 (Colo. 2010) (Rice, J., dissenting). In other words, "no one actually pa[ys]" these amounts. *Wal-Mart Stores, Inc. v. Crossgrove*, 2012 CO 31, ¶ 29 (Eid, J., dissenting); *see also Gardenswartz,* 242 P.3d at 1092 (Rice, J., dissenting) (noting that "neither the plaintiff nor his insurer ever actually incur[s]" damage for amounts billed that are not paid). Unlike *Crossgrove* and *Gardenswartz*, however, this case involves not just whether a plaintiff can suggest to the jury that the amount of medical expenses submitted to a health insurer constitute "reasonable value," but whether a plaintiff can claim as damages expenses submitted for medical treatment in the workers' compensation system that are void and unenforceable as a matter of law.

Colorado's workers' compensation system was statutorily created and is highly regulated. Under that system, medical expenses on invoices submitted in excess of a statutory fee schedule are "void, unlawful, and unenforceable." C.R.S. § 8-42-101(3)(a)(I). The majority's interpretation would allow a plaintiff to submit as "reasonable value" expenses that are legally void.

If affirmed, *Scholle* would have a punitive impact on defendants. It would allow plaintiffs to recover damages bearing no relationship to the amount necessary to "make [an] injured party whole." *Seaward Construction Co. v. Bradley*, 817 P.2d 971, 974 (Colo. 1991). Such damages cannot be considered "compensatory" in any

meaningful sense. Devoid of a compensatory purpose, permitting plaintiffs to obtain unlawfully charged medical expenses and then interest on those sums could serve only to punish. This, of course, is prohibited. The General Assembly has unambiguously limited punitive damages to circumstances in which a plaintiff proves beyond a reasonable doubt that the defendant committed fraudulent, malicious, or willful and wanton misconduct. *See* C.R.S. §§ 13-21-102(1)(a), 13-25-127(2).

The majority's approach would allow plaintiffs to end-run Colorado law and recover punitive damages even where a defendant is merely shown to be negligent by a preponderance of the evidence. This unjust result would then be compounded by a plaintiff's ability to recover prejudgment interest (at a rate of 9% per year, compounded after the filing of suit) on bills that are void and unlawful. *See* C.R.S. § 13-21-101(1).

The majority should be reversed, and the Court should instead hold that (i) only medical expenses that plaintiff's provider is legally allowed to submit are admissible as evidence, and (ii) punitive damages are limited to situations in which a plaintiff establishes beyond a reasonable doubt that the defendant's conduct was fraudulent, malicious, or willful and wanton.

ARGUMENT

The General Assembly has expressly limited punitive damages to situations where the defendant's fraudulent, malicious, or willful and wanton misconduct has been proven beyond a reasonable doubt. *See* C.R.S. §§ 13-21-102(1)(a), 13-25-127(2). It has, likewise, cabined prejudgment interest to apply only to compensatory damages. *See* C.R.S. § 13-21-101(1). The majority's decision seeks to judicially abrogate these statutes by permitting the admission of evidence of void and unlawfully medical expenses, and the recovery of prejudgment interest on any subsequently awarded damages—which would allow a plaintiff to recover more than the amount necessary to fully compensate them for their past medical expenses.

I. PERMITTING DAMAGES BASED ON THE UNLAWFULLY BILLED AMOUNTS OF PLAINTIFFS' MEDICAL EXPENSES VIOLATES COLORADO'S PUNITIVE DAMAGES STATUTES

The General Assembly's evidentiary and substantive limitations on punitive damages prohibit a jury from awarding past medical expenses that a plaintiff has not (and *cannot*) incur.

A. Billed Amounts Exceed What Is Necessary to Compensate Plaintiffs for Their Medical Expenses

Under Colorado law, "[c]ompensatory damages in a negligence action are awarded to cover loss caused by the negligence of another and are intended to make the injured party whole." *Bradley*, 817 P.2d at 975; *Airborne, Inc. v. Denver Air Ctr.,*

Inc., 832 P.2d 1086, 1091 (Colo. App. 1992) ("We agree that the goal of compensatory damages is to make the plaintiff whole.")

Billed amounts often represent many multiples of the amounts actually incurred. *See, e.g.*, *Crossgrove*, 276 P.3d at 568 (Eid, J., dissenting) ("The medical providers in this case billed the plaintiff $242,000 for medical services, but accepted $40,000 from plaintiff's health insurer as payment in full."). Hospital executives have explained that billed amounts of medical expenses bear "no relation to anything"—certainly not to the cost of medical services—and that there is no longer any method to the medical pricing "madness." Hall and Schneider, *Patients as Consumers: Courts, Contracts, and the New Medical Marketplace*, 106 Michigan L. Rev. 643, 665 (Feb. 2008). In other words, billed amounts are nothing more than "theoretical damages . . . that neither the plaintiff nor his insurer ever actually incurred in treating the plaintiff's injuries[.]" *Gardenswartz*, 242 P.3d at 1090, 1092 (Rice, J., dissenting).

Colorado's workers' compensation scheme establishes a fee schedule "for which all surgical, hospital, dental, nursing, vocational rehabilitation, and medical services, whether related to treatment or not, *pertaining to injured employees* under this section shall be compensated." C.R.S. § 8-42-101(3)(a)(I) (emphasis added). The statute makes "unlawful, void, and unenforceable" any amounts billed in excess

of the statutory fee schedule. *Id.* Colorado law could not be clearer: healthcare providers must render services to injured workers in compliance with the statutory fee schedule. Any expenses incurred in excess of the fee schedule are simply unlawful, void, *and* unenforceable.

But that's not all. The General Assembly also found it would be unlawful even to *bill* in excess of the fee schedule. The statute provides:

> **It is unlawful, void, and unenforceable** as a debt **for any** physician, chiropractor, hospital, **person**, expert witness, reviewer, evaluator, or institution **to** contract with, **bill, or charge any party for services, rendered in connection with injuries coming within the purview of this article or an applicable fee schedule, which are or may be in excess of said fee schedule unless such charges are approved by the director**.

C.R.S. § 8-42-101(3)(a)(I) (emphasis added). Thus, any amount billed in excess of the approved fee schedule could *never* represent "the reasonable value of medical services" for an injured worker because a healthcare provider could not lawfully charge it.

The majority considered but declined to follow the reasoning set forth in *Lebsack v. Rios*, No. 16-CV-02356-RBJ, 2017 WL 5444568 (D. Colo. Nov. 14, 2017). There, the court found that a plaintiff should not be permitted to "recover from defendants amounts that the healthcare providers could not lawfully charge and that [plaintiff] had no obligation to pay." *Id.* at *3. In fact, the workers' compensation

statute does not merely note that the provider cannot bill a plaintiff for amounts in excess of the fee schedule, it also provides that no "person" can "bill or charge any party for services . . . which are or may be in excess of said fee schedule." C.R.S. § 8-42-101. Judge Richman in his dissent from the majority opinion in *Scholle* pointed out that "[a] court [cannot be] in the position of facilitating the enforcement of an unlawful, void, and unenforceable contract." *Scholle*, ¶ 100 (Richman, J., dissenting).

Because the statutory fee schedule sets the *only* amount that could lawfully be billed or paid for the medical treatment of work-related injuries, it sets the ceiling for what is required to "make the plaintiff whole." *Airborne*, 832 P.2d at 1091. Any amount unlawfully billed in excess of that schedule therefore cannot be "reasonable." Damages based on void, unlawful invoices serve no compensatory purpose and could only have an impermissible punitive impact.

B. Colorado's Punitive Damages Statutes Prohibits the Admission of Billed Amounts as Evidence of Past Medical Expenses

"Punitive damages are available in Colorado only pursuant to statute." *Bradley*, 817 P.2d at 973. The General Assembly has expressly limited such damages to circumstances in which "the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct." C.R.S. § 13-21-

102(1)(a). It has, likewise, mandated that such misconduct be proven "beyond a reasonable doubt." *Id.* at §13-25-127(2).

The court may reverse or reduce a punitive damages award if (i) "[t]he deterrent effect of [such] damages has been accomplished," (ii) "[t]he conduct which resulted in the award has ceased," or (iii) "[t]he purpose of such damages has been served." *Id.* at § 13-21-102(2). And the General Assembly has determined that punitive damages cannot "exceed three times the amount of actual damages," unless a plaintiff proves the following:

> (a) The defendant has continued the behavior or repeated the action which is the subject of the claim against the defendant in a willful and wanton manner, either against the plaintiff or another person or persons, during the pendency of the case; or
>
> (b) The defendant has acted in a willful and wanton manner during the pendency of the action in a manner which has further aggravated the damages of the plaintiff when the defendant knew or should have known such action would produce aggravation.

Id. at § 13-21-102(3).

"When construing statutes," the Court must "first look to the statutory language itself." *People v. Pearman*, 209 P.3d 1144, 1145 (Colo. App. 2008). If the Court "can give effect to the ordinary meaning of the words adopted by the General Assembly, [it] must apply the statute as written." *In Matter of the Adoption, T.K.J*, 931 P.2d 488, 492 (Colo. App. 1997); *see also People v. Robertson*, 56 P.3d 121,

123 (Colo. App. 2002) ("When th[e] [statutory] language is clear and unambiguous, there is no need to resort to interpretative rules of statutory construction, and the court must apply the words according to their commonly accepted and understood meaning[s].").

Here, the statutory language is clear. Plaintiffs can only receive punitive damages upon a showing beyond a reasonable doubt that the defendant engaged in fraud, malice, or willful and wanton conduct. The majority's approach would judicially abrogate this requirement and replace it with a standard that requires nothing more than a showing of simple negligence by a preponderance of the evidence. The majority's holding would permit plaintiffs to obtain damages based on void, unlawful invoices without any evidence of willful and wanton conduct. C.R.S. § 13-21-102(1)(a). Worse, courts could not even exercise their authority to reduce or reverse such an award even where appropriate under section 13-21-102(2), because the majority considers damages based on void, unlawful charges to be compensatory—and not punitive.

If the General Assembly wanted to carve out these exceptions from Colorado's punitive damages laws, it would have done so. *Shelter Mut. Ins. Co. v. Mid-Century Ins. Co.*, 246 P.3d 651, 662 (Colo. 2011) (declining to read provision into statute otherwise silent because had the General Assembly wanted such a result,

"it knew how to do so."); *People ex rel. S.G.L.*, 214 P.3d 580, 586 (Colo. App. 2009) (declining to read into a statute a provision allowing for no-fault adjudications because the legislature knew how to provide for such procedures). But it didn't. The Court should refuse to read broad exceptions into Colorado law where none exist. Doing so would be especially egregious here—where the amounts charged for medical services are recognized explicitly as being "unlawful, void, and unenforceable" as a matter of law. C.R.S. § 8-42-101(3)(a)(I). The General Assembly could never have intended such an incongruous result. *See Jefferson Cty. Bd. of Equalization v. Gerganoff*, 241 P.3d 932, 935 (Colo. 2010) ("The language at issue must be read in the context of the statute as a whole and the context of the entire statutory scheme.").

When read together, the General Assembly's punitive damages and workers' compensation statues confirm that compensatory damages should be limited to the amount required to "make the plaintiff whole"—*i.e.*, the statutory fee schedule. *Airborne*, 832 P.2d at 1091. Any amounts unlawfully charged in excess of that fee schedule should thus be inadmissible as a matter of law.

II. ASSESSING PREJUDGMENT INTEREST ON UNLAWFULLY BILLED AMOUNTS WOULD VIOLATE COLORADO'S PREJUDMGENT INTEREST STATUTE

The majority's decision would not only punish defendants by creating a back-door for punitive damages, it would also compound those damages by implicitly requiring prejudgment interest to be assessed on the unlawfully billed amounts—in plain violation of Colorado's prejudgment interest statute.

In Colorado, "[p]rejudgment interest on damages awarded in a personal injury action is specifically authorized by statute." *Allstate Ins. Co. v. Starke*, 797 P.2d 14, 19 (Colo. 1990). The governing statute is section 13-21-101, which states in relevant part:

> In all actions brought to recover damages for personal injuries sustained by any person resulting from or occasioned by the tort of any other person . . . , it is lawful for the plaintiff in the complaint to claim interest on the damages claimed from the date the action accrued. When such interest is claimed, it is the duty of the court in entering judgment for the plaintiff in the action to add to the amount of damages assessed by the verdict of the jury, or found by the court, interest on the amount calculated at the rate of nine percent per annum on actions filed on or after July 1, 1975, and at the legal rate on actions filed prior to such date, and calculated from the date the suit was filed to the date of satisfying the judgment and to include the same in the judgment.

C.R.S. § 13-21-101(1)

This Court "has held repeatedly that the legislative purpose behind section 13-21-101 is to provide compensation to successful tort plaintiffs." *Morris v. Goodwin*,

185 P.3d 777, 780 (Colo. 2008). In *Starke*, for example, the Court stated that "prejudgment interest is an element of compensatory damages in actions for personal injuries." 797 P.2d at 19. In *Bradley*, the Court noted that the purpose of such interest is "to compensate a damaged party for the loss of use or the unlawful detention of money . . . not to penalize the wrongdoer, . . . or to make the damaged party more than whole." 817 P.2d at 977 (citations and internal quotation marks omitted).

Thus, Colorado courts have repeatedly refused to award prejudgment interest in a manner that punishes defendants or provides a windfall to plaintiffs. *See, e.g., Watson v. Public Service Co.*, 207 P.3d 860, 867 (Colo. App. 2008) ("Absent an express indication of legislative intent to deviate from the principle that prejudgment interest is compensatory, it will be awarded only on compensatory damages."); *AE, Inc. v. Goodyear Tire*, 168 P.3d 507, 512 (Colo. 2007) ("[A]warding prejudgment interest on punitive damages would not accomplish the primary purpose of making the plaintiff whole. "); *Heid v. Destefano*, 586 P.2d 246, 247 (Colo. App. 1978) (explaining that the purpose of an award of prejudgment interest under § 13-21-101(1) is to "compensate a successful plaintiff for the loss of the use of the money to which he has been entitled").

In *Bradley*, for example, the Court held that, under section 13-21-101(1), a plaintiff who is awarded exemplary damages in a personal injury action is not

entitled to an award of prejudgment interest on such exemplary damages. *Id.* at 979. Because prejudgment interest on exemplary damages would serve merely as an additional penalty and was not necessary to make an injured party whole, the Court determined that it could not be calculated based on punitive damages. *Id.* at 976.

Nor are Colorado courts alone in limiting prejudgment interest to compensatory damages. Other jurisdictions have reached similar conclusions. *E.g., Casto v. Arkansas-Louisiana Gas Co.*, 562 F.2d 622, 625-26 (10th Cir. 1977) (applying Oklahoma law to preclude prejudgment interest on punitive damages); *Andersen v. Edwards*, 625 P.2d 282, 289 (Ak. 1981); *Ramada Inns, Inc. v. Sharp*, 711 P.2d 1, 2 (Nev. 1985); *Belinski v. Goodman*, 354 A.2d 92, 96 (N.J. Super Ct. App. Div. 1976); *D'Arc Turcotte v. Estate of LaRose*, 569 A.2d 1086, 1088 (Vt. 1989); *Poling v. Wisconsin Physicians Service*, 357 N.W.2d 293, 298 (Wis. App. 1984).

Yet that is precisely what the majority's decision accomplishes here. Permitting plaintiffs to obtain damages based on unlawfully billed (and never incurred) medical expenses implicitly requires courts to assess prejudgment interest those damages. What was already a dramatic punitive sanction in violation of

Colorado's punitive damages statute is thus made worse by the assessment of interest at a rate of 9% per year, compounded annually after suit is filed.[1]

Because the fixed rate in Colorado for prejudgment interest over the last several years has considerably exceeded market interest rates, personal injury claimants who litigate their cases to judgment receive not only protection against the diminution of value but—in fact—a significant windfall. For example, the rates on U.S. Treasury bills have consistently held *well below* 5.5% since 2006. *See* Daily Treasury Bill Rates Data, U.S. Department of the Treasury, *available at* https://www.treasury.gov/resource-center/data-chart-center/interest-rates/Pages/TextView.aspx?data=billratesAll, *with Rodriguez v. Schutt*, 914 P.2d 921, 929 (Colo. 1996) (establishing that "prejudgment interest on all personal injury money judgments will accrue at nine percent." (emphasis omitted).) The average annual return for the S&P 500 from 1957 through 2018 is roughly 8%. *See* J.B. Maverick, *What is the average annual return for the S&P 500?* (last updated May 21, 2019), *available at* https://www.investopedia.com/ask/answers/042415/what-average-

[1] "Total prejudgment interest is arrived at by first calculating simple interest on the amount of the judgment from the date the plaintiff's action accrued [here, the date plaintiff's lawsuit was dismissed] until the day before the action was filed." *Xiong v. Knight Transportation, Inc.*, 77 F. Supp. 3d 1016, 1025 (D. Colo. 2014) (citing *Francis ex rel. Goodridge v. Dahl*, 107 P.3d 1171, 1176 (Colo. App. 2005)). "This amount must then be added to the amount of the judgment and used as the initial base amount." *Id.* "Finally, the initial base amount is used to calculate compound interest annually from the date the suit was filed until the date judgment is entered." *Id.*

annual-return-sp-500.asp. Thus, a personal injury plaintiff's windfall (and a defendant's punitive sanction) under the majority's approach is two-fold (i) damages are assessed based on unlawful and void bills (which no person or entity is required to pay), and (ii) prejudgment interest is assessed at a rate of 9% per year based on the unlawful charges.

Such an approach constitutes a violation of Colorado authority governing pre-judgment interest, punitive damages, and workers' compensation. The only way to harmonize these statutes is for the Court to hold that, where, as here, the General Assembly has expressly defined the value of medical services incurred in connection with a specific type of injury, plaintiff may submit as evidence at trial only legally permissible charges for medical expenses. Bills generated that violate the law cannot be admissible.

CONCLUSION

For the reasons set forth above, the Court should reverse and remand the case to the court of appeals with direction to affirm the district court's judgment in Defendant's favor.

Respectfully submitted this 4th day of February, 2020.

This pleading is filed electronically pursuant to COLO. R.P.C., 121 § 1- 26. The original signed pleading is in counsel's file.

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